Notes on Acts and Laws

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I. INTRODUCTORY

1. What is the nature of the Law of Limitation ?

1. There are various ways in which a time-limit enters into a course of litigation:

(1) Cases where the law says action shall be taken *within* a stated period:

Illus.—Order 6 Rule 18.—Amendment of a Plaint. Party obtaining leave to amend must amend within the time fixed by the Court for amendment and if no time is fixed then within 14 days. (2) Cases where the law says action *shall not* be taken before a certain period has elapsed.

Illus.—Section 80 of the C. P. C.—Suit against Secretary of State. No suit shall be instituted against the Secretary of State for India in Council or against any public officer in respect of any Act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given.

(3) Cases in which the law prescribes that action shall not be taken *after* a certain period has elapsed.

2. It is the *third* class of cases which strictly speaking constitute the subject-matter of the Law of Limitation.

2 Distinction between Limitation—Estoppel— Acquiescence and Laches

All these have the effect of denying to an aggrieved party a remedy for the wrong done to him. That being so it is necessary to distinguish them from Limitation as such.

Limitation and Estoppel

1. By Limitation a person is prevented from getting relief because of his having brought the action after the time prescribed for bringing his suit.

2. By Estoppel a person fails to get relief because he is prevented by law from adducing evidence to prove his case.

Limitation and Acquiescence

1. Limitation defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong because his suit is beyond time.

2. Acquiescence defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong.

Limitation and Laches

1. Both have one common feature—relief is denied on the sole ground that action is not brought within time.

2. The distinction lies in this—In limitation time within which action shall not be brought is prescribed by Law. In laches there is no time prescribed and the Court, therefore, in granting relief works on the principle of unreasonable delay.

3. In India the doctrine of laches has not much scope because of the Law of Limitation which has prescribed a definite time limit for almost all actions. It does not, therefore, matter whether a man brings his suit on the first day or the last day of the period prescribed by law for his action.

3. The doctrine of laches applies in India only in the following cases:

(1) Where the relief to be granted by the Court is *discretionary.*

This is so

(i) In cases falling under specific relief.

(ii) In cases falling under interlocutory relief.

(2) Where the Law of Limitation does not apply e.g. Matrimonial suits.

Delay would mean that the offence was condoned.

3 The object of Limitation

1. Two things are necessary for a well-ordered community (i) Wrongs must be remedied. (ii) Peace must be maintained.

2. To secure peace of the community it is necessary that titles to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense.

3. Consequently, if persons are to be permitted to claim relief for what they think are wrongs done to them, then they must be compelled to seek relief within a certain time. There is nothing unjust in denying relief to a person who has tolerated the wrong done to him beyond a certain period.

4. The Law of Limitation is based upon this principle.

5. That being the underlying principle, the Law of Limitation is absolute in its operation and is not subject to agreement or conduct of the parties. That is to say it is not subject to

(1) Waiver.

(2) Custom.

(3) Estoppel.

(4) Variation in respect of enlargement or abridgement of time by agreement of parties sections 28 and 23 of the Contract Act.

6. In this respect the Law of Limitation differs from the Law of Negotiable Instruments.

7. *Limitation and the onus of Proof.*

1. The onus of proof is upon the Plaintiff. He must prove that his suit is within time.

37. *Bom. S. R. 471 - A.I.R.. 1935 September.*

A by a registered lease, dated 8th July 1922, gave certain lands to *B* on a rental for a period of 25 years. Subsequently, *A* dispossessed *B* alleging that the lease was taken by undue influence. *B* brought a suit

against *A* for an injunction restraining *A* from interfering in any way with his possession and enjoyment and for possession of land.

It was contended on behalf of B that A was precluded from challenging the validity of the lease, on the ground that if he had sued to have the lease set aside the suit would have been barred by Limitation. In other words, it was contended that the plea of the Defendant was barred of the Limitation.

Question is : Is Defendant bound by the Law of Limitation ?

The answer is No. —Section 3 refers to Plaintiff and not to Defendant.

8. *Plea of Limitation and the Stage of the Proceedings.*

1. The plea of limitation may be raised at any stage of the proceedings, i. e., it can be raised even in second appeal.

2. It can be raised for the first time in appeal

38 Mad. 374
36 Cal. 920
38 Cal. 512
38 Bom. 709 (714).

3. It can be raised in appeal even though it was abandoned in the trial Court.

3 All. 846 (848).

4. It can be raised before the Privy Council although it had been abandoned in the Courts below.

361 A. 210.

5. This is subject to the proviso that when it is raised in the appeal stage Court will not allow it if the facts on record are not sufficient for its decision and if it involves a further inquiry into facts.

57 Cal. 114.

II. THE INDIAN LAW OF LIMITATION

Its Scheme of arrangement

Operation of Lapse of time under Indian Statute Law

1. Lapse of a definite period of time produces four results under Indian Statute Law.

(1) It multiplies the right of the holder to obtain a remedy for the wrong—Section 3 of the Limitation Act.

(2) It not only bars his remedy but extinguishes his right—Section 28 of the Limitation Act.

(3) It confers a right to light, air, way, watercourse, use of water or easements on a person who has enjoyed it for a prescribed period—Section 26 Limitation Act. (4) It extinguishes right to easements—Section 47 of Act V of 1882.

(2), (3), (4) are cases which fall under the Law of Prescription. (1) Only falls under the Law of Limitation. The Limitation Act deals with a mixed body of law

and two must be studied separately.

II. THE INDIAN LAW OF LIMITATION

Its Applicability

I. In respect of Territory

1. The Act extends to the whole of British India—*Section 1(2).*

2. The Act applies to *every* suit instituted, appeal preferred and application made in Courts functioning in British India.

3. It does not matter where the cause of action, whether in British India or outside British India, it does not matter where the transaction took place, whether in British India or outside British India, if the suit is instituted or appeal is preferred or application is made in a Court in British India, the Law of Limitation that will apply will be the Indian Law of Limitation and not Foreign Law of Limitation.

4. There is one exception to this rule which is enacted in section 11 (2) which says : A Foreign Rule of Limitation shall be a defence to suit in British India on a contract entered into in a foreign country if the rule has extinguished the contract and that the parties were domiciled in such country during the period prescribed by such rule.

2. **In respect of Proceedings**

1. SPECIAL PROCEEDINGS

(1) *Arbitration Proceedings*

It was at one time doubted if the Limitation Act applied to proceedings before an Arbitrator on the ground that it applied only to suits, appeals and applications to the *Court* and that the Arbitrator was not a Court. This doubt has now been resolved by the Privy Council which has held that where persons have referred their disputes to arbitration, the arbitrator must decide the dispute according to the existing law and that he must recognise and give effect to every defence of limitation, unless that defence has been excluded by agreement between the parties. (1929) 561. A. 128.

Ques. This decision goes to the length of laying down that parties can vary the Law of Limitation by private agreement. This seems to overlook the provisions of sections 28 and 23 of the Contract Act.

(2) *Proceedings under the Companies Act.*

When a Company is being wound up and a liquidator is appointed to carry on the affairs of such Company, Section 186 of the Company's Act provides that the liquidator may make an *application* to the Court for an order upon a person " to pay any moneys due from him to the Company. " Ordinarily there would have to be a suit. But to avoid multiplicity of suits this special proceedings is permitted by law.

Question is whether Limitation applies to such proceedings. It has been held that "money due" in section 186 means moneys due and recoverable in law, i.e., *moneys not* time-barred. This means that the Law of Limitation applies to

such proceedings. *601.A.13(23)*

(3) *Proceedings under the Income Tax Act.*

The Civil Courts in India have no jurisdiction in matters of public revenue.

They can have such jurisdiction only if a particular Revenue Act invests them with such jurisdiction. For example a provision will be found in section 66(3) of the Indian Income Tax Act of 1922. Under the section, a party aggrieved by an order of the Income Tax Officer in the matter of assessment may apply to him for stating a case to the High Court and if he refuses may apply to the High Court for an order compelling the Commissioner to state a case and refer it to the High Court.

There is a time-limit for such an application. But the Law of Limitation does not apply to it. The time-limit is the time-limit prescribed by the Income Tax Act and not by the Law of Limitation.

(4) Proceedings before the Commissioner of Workmen's Compensation

The Workmen's Compensation Act, 1923, provides for Compensation to be paid to workmen for injuries caused to them

in the course of their employment. The cases are heard by a Commissioner. The Commissioner is a special tribunal and not a Court and therefore the Limitation Act does not apply to proceedings before him.

This does not mean that the claim for compensation for injury can be prosecuted before him at any time. That would be so if the Act had made no provision for a time-limit. As the Act has presented six months as the time-limit, suits have to be brought within that period. (5) *Proceedings under Registration Act.*

(1) Presentation of Documents—4 months.

(2) Appearance of Parties for admitting Documents-4 months.

3. Criminal Proceedings

1. Criminal Proceedings are generally instituted in the name of the Crown because they involve a breach of the King's peace.

2. It is a maxim of Constitutional Law that lapse of time does not affect the right of the King.

3. That being so the Law of Limitation does not apply to criminal prosecutions.

4. Two things may be noted :

(1) There are many Acts which prescribe limits of time for institution of prosecution under those Acts. E.g. Government of India Act, Section 128 : Opium Act, Customs Act, Salt and Excise Acts and Police Act.

(2) Limitation Act, although it does not provide for any time-limits for criminal prosecutions, it does provide for *appeals* under the Cr. P. C.

4. Civil Proceedings

(i) With regard to *suits* different kinds of suits have been specified in different Articles. There is also a general residuary Article No. 120 which is made to apply to any suit for which no period of limitation is provided

elsewhere in the Schedule. The Act, therefore, applies to *all* suits.

(ii) With regard to *appeals* there are two Courts to which appeals can lie in India—(i) The Court of a District Judge and (ii) The High Court. The Limitation Act specifies appeals to both these Courts and therefore, it can be said that the Law of Limitation applies to all appeals.

(iii) With regard to *applications,* different kinds of applications are enumerated in the different articles in the Schedule. As in the case of articles relating to suits there is also an Article 181 for applications for which no period of limitation is prescribed elsewhere in the schedule or by section 48 of the C. P. C. But almost all High Courts have held that the operation of this Act is to be restricted to applications under the C. P. C. only. That being so it is clear that the Limitation Act *does not apply* to *all* applications. For instance it does not apply to :

(i) Applications for the grant of probate letters of administrations succession certificates.

(ii) Applications under the Rules of the High Court

32 Bom. I
48 Cal. 817
46 Cal. 249.

(iii) Applications under a Local or Special Act (unless such Act provides for it).

These not being matters dealt with by the C. P. Code.

In respect of persons

1. The general rule is that the plea of limitation applies to every Plaintiff.

2. Originally, limitation did not apply to the Crown when it sued as a Plaintiff, on the ground that lapse of time did not affect the Crown. This maxim of Constitutional Law although it governs criminal prosecutions has been negatived so far as civil proceedings by the Crown are concerned by Article *149* of the Limitation Act which applies to every kind of *suit brought by Government,* and prescribes *60* years as the time-limit. Suits *against* Government must be brought within the ordinary time-limits.

15 Mad. 315.

Similarly, suits by private persons *claiming through* Government are also subject to the ordinary time-limit prescribed by the Act. This was always the rule. It was not always the rule for Government to bring a suit within any prescribed time. This has now been altered. It can, therefore, be said that as a rule the Law of Limitation applies to *all* persons whether they are private persons or corporate bodies of Governments, and that the plea of limitation is available to every Defendant as against every Plaintiff whether that Plaintiff is a private person or a Government.

3. The plea of limitation is available to every Defendant. To this rule there are certain exceptions.

37 *Bom.—-S. R. 471*

Section 10.

1. The defence of limitation is not available to a person in whom property has become *vested in trust* for any specific purpose nor is it available to his legal representatives or assigns (not being assigns for valuable consideration), in a suit for recovery of the property or the proceeds thereof or for an account of such property. This section is to be applied to an *express trust* as distinguished from an *implied* or *constructive trust.* A trustee of an implied or constructive trust can take the defence of limitation.

Distinction between an Express Trust and Implied or Constructive Trusts.

Persons, therefore, who are holding a fiduciary position are not trustees within the meaning of Section 10 ; E.g. Agent, Manager, Factor, Benamidar, Executor or Administrator, Banker, Surviving partner. Director of a Company Liquidator of a Company, *Karta* or Manager of a joint Hindu family.

Secondly Section 10 is applicable only in cases of persons "in whom property has become *vested* in trust for a *specific purpose" 44 Mad.* 277 *(281-2).*

What is Specific Purpose ? A specific purpose is a purpose that is actually and specifically defined in the document by which the trust is created for a purpose which from the specified terms can be certainly affirmed.

49 1 .A. 37 (43)
58 I.A.I

That being so even a trustee *de son tort* would fall within this Section.

Meaning of *a trustee de son tort.*

Explanation.—Hindu, Mohammedan and Charitable endowments are declared to be express trusts and their managers express trustees.

Thirdly.-Section 10 not only applies to the defaulting trustee himself, but also applies to his legal representatives and assigns except assigns for valuable consideration. Purchasers for value from a defaulting trustee are protected and they can plead limitation.

Whether purchasers from a trustee must in addition to being purchasers for value should also be purchasers without notice of trust is a point on which the Act is silent. Judicial decisions on this point are, however, in conflict.

Section 29 (3) II. The Limitation Act does not apply to parties litigating under the Indian Divorce Act (IV of 1869).

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As against a Special Law

1. Besides this General Law of Limitation there are other special or local laws which also prescribe time-limits for suits, appeals or applications. In case there is a difference between the time-limits fixed by the general and special law, question is which law is to prevail.

2. The answer to this question is given in Section 29. According to the Section the special law will prevail over the general law.

3. Section 29 also provides for the applicability and non-applicability of the

other Sections of the Limitation Act in cases of conflict between the general and special law as to time-limit.

4. According to Section 29, in cases of conflict the provisions of Sections 4, 9 to 18 and 22 of the Limitation Act will apply

(unless expressly made inapplicable) and the remaining provisions of the Act shall not apply (unless expressly made applicable by the Special Law).

The Scheme of the Law of Limitation

1. The Indian Limitation Act consists of 29 Sections and one Schedule.

2. The Schedule is divided into three Divisions :

First Division—deals with Suits.

Second Division—deals with Appeals.

Third Division—deals with Applications.

3. The Schedule in respect of each of its Divisions is cut up into 3 Columns.

Column 1—Describes the nature of the claim for which suit is brought or of the appeal or if application is made. Provision is made for 154 different classes of suits.

Provision is made for 9 different classes of appeals. Provision is made for 26 different classes of applications.

Each of these provisions is numbered seriatim and is called article no. so and so. There are in all 189 articles in the Schedule though the last article is 183, that is, because some articles have the same number and are distinguished by the addition of A to the same number.

Column 2.—Specifies the period *within* which the suit must be filed, appeal or application must be made.

Column 3.—Specifics the starting-point of the period of limitation within which *suit* must be filed or appeal or application must be made.

4. The Sections of the Act in so far as they deal with the Law of Limitation as distinguished from the law of prescription deal with various questions arising out of the three columns of the Schedule. The Schedule, therefore, is the most important part of the Law of Limitation.

IV.LAW OF LIMITATION

Questions arising out of Column 3

Subject-matter of Column 3

1. Column 3 deals with the starting point of Limitation. Two Questions arise—

(1) When does time begin to run ? What is the starting point of Limitation ?

(2) Is there only one starting point of Limitation? *Or* Can there be a fresh starting point of Limitation ?

1. *When does time begin to run ? What is the starting-point of Limitation.*

1. The answer to the question as to when time begins to run is this. Time in respect of the institution of a *suit, appeal* or *application* begins to run from the occurrence of the event mentioned in Column 3. In most cases the event is

the incident. . But in some cases it is the knowledge of the incident to the Plaintiff—90-92. Whether it is the incident or the knowledge of the incident, in any case the occurrence of the event in Column 3 marks the starting point of limitation. Two questions with respect to right to sue and cause of action.

(1) Must a Plaintiff sue when there is a cause of action ?

2. Confining to suits it may be said that time begins to run when the right to sue arises—Article 120. This is the first fundamental Rule.

When does the right to sue arise ? It arises—

(i) When the event mentioned in column 3 occurs if the suit falls under any of the articles.

(ii) When the suit does not fall under any specific article but falls under the general article (120) then right to sue accrues when the cause of action arises or in certain cases knowledge that cause of action has arisen comes to the Plaintiff, so that time begins to run from the occurrence of the cause of action or from the date of the knowledge of the cause of action.

Cause of action arises when a wrong is done to a party. Every wrong does not necessarily give rise to a cause of action. The wrong must under the circumstances be real and necessitate taking of action.

(iii) The effect of death on the starting point of Limitation.

1. When does limitation commence in the case of a person who dies before the right to sue accrues to him ?

2. When does limitation commence in the case of a person who dies before another person gets a right to sue him ?

1. When a person dies *before* the right to sue accrues to him the period of limitation *will commence* when there is a legal representative of the deceased capable of instituting such a suit.

II. When a person against whom a right to sue would have accrued dies before such accrual, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom a suit could be brought.

Exception to the fundamental Rule—Limitation runs from the moment the right to sue accrues

1. Cases where Limitation commences *before* the right to sue accrues.

(i) Money payable on demand and money payable on a Bill or a Pronote made on demand.

In these cases unless there is a demand to pay and there is a consequent refusal to pay there is no right to sue. The right to sue arises on the date of the refusal to pay. But time begins to run not from the date of the refusal but from the date of the loan or the date of the Bill or note, i.e., *before* right to sue has accrued. 57—58—59—67—73

(ii) Redemption of a Pledge—suits on—

The pawnee's right to sue to recover the pledge accrues on the date on

which the debt in respect of goods pledged is paid off by him. But time begins to run not from the date of payment but from the date of the pledge, i.e., *before* the right to sue has accrued—145.

§ Cases where Limitation does not commence even the right to sue has accrued—Sections *6,* 7, *8*

1. These are cases where a person to whom a right to sue has accrued is suffering from a disability the date on which the right to sue accrued.

2. According to this exception time will not run against a person who is suffering from a disability although the right to sue has accrued to him.

3. Only three kinds of disabilities are recognised— (i) minority, (2) lunacy, (3) idiocy.

4. In the case of a person suffering from a disability, time commences when the disability ceases.

5. Where these disabilities are concurrent or succession in their operation, limitation commences when all such disabilities have ceased.

6. Where the disability continues upto the death of the person then time will commence against his legal representative from the date of his death.

7. If the legal representative is under a disability at the death of the person then time will commence when the disability of the legal representative comes to an end.

8. What is the effect of a disability of persons who are jointly entitled to sue upon the starting point of limitation.

Two cases must be distinguished:

(i) Where only some of them are under a disability.

(ii) Where *all of them* are under a disability.

1. Where *only some* of them are under a disability :

(i) Where full discharge or release can be given to the Defendant by the **party** not *under, disability* without the concurrence of the person under a disability time will commence to run against all of them from the time the right to sue accrues.

(ii) Where no such discharge can be given, time will not run against any of them until the disability ceases or until the person under disability loses his interest in the subject-matter.

II. Cases where *all* persons who are entitled to sue are under a disability:

(i) Where all are under a disability, rules laid down in Section 6 will apply.

(ii) Where one of them *ceases* to suffer from the disability, Section 7 will apply and the governing question will be whether the person who is free from his disability give a valid discharge without the concurrence of those who continue to suffer from their disability. If the answer is in the affirmative, time will commence to run against *all* from the moment the disability of such a person has ceased to operate. If the answer is in the negative then lime will not run against any of them until *all* of them cease

to suffer from their disabilities.

9. Within what time from the date of the Cessation of the disability, a suit must be brought by the person who was under a disability when the right to sue accrued to him ?

1. There are three answers to this question.

(i) Within the prescribed period *to be counted from the date of the accrual of the right to sue, if* the period left over after the cessation of the disability is more than three years.

Illus. Prescribed period—12 years from 1920 to 1932.

Years of disability—4 years i.e. 1924 to 1936.

Period left over—9 years. Suit must be brought before 1932.

Suit must be brought within 9 years, i.e., within 12 years from the accrual of the right to sue i.e. within the prescribed period. He gets no benefit at all. Even his time is counted from the date of the accrual of right to sue.

(ii) Within the prescribed period *to be counted from the cessation of the disability,* if the period prescribed is less than three years.

He gets no benefit from his disability ; only his time begins to run from the date of the cessation of the disability.

Illus. Prescribed period I year from 1920 to 1921.

Years of disability—4 years. *S. P.* 1924 Bar 1925.

Suit must be brought in 1925.

(iii) Within *three* years from the date of the cessation of the disability, if the period left over after the cessation of the disability is *less* than three years and the period prescribed is *more* than three years.

Prescribed period—6 years from 1920 to 1926.

Years of disability—4 years from 1924—Bar 1930.

Period left over after cessation is—2 years.

Suit must be brought in 1928 within three years from cessation of disability.

10. Some points to be noted with regard to this question of disability.

(i) The Section applies only to *suits* and to applications for the execution of a decree, but not to any other applications, nor to appeals.

(ii) The Section applies only to a person who was already under a disability when the right to sue accrued. If the disability supervenes *subsequently* than the Section does not apply.

(iii) The Section applies only where the *Plaintiff* or the person entitled to sue is under a disability. The disability of the *Defendant*—person liable to be sued—does not matter at all.

Time will begin to run against the Plaintiff even if the Defendant is suffering from a disability.

First Fundamental Rule is that limitation starts in the case of person who is not suffering from a disability, from the date of the occurrence of the

event mentioned in Column 3 and if no event is mentioned in Column 3 then from the date when the cause of action is said to arise.

Fundamental Rule II

1. When once time has begun to run, no subsequent disability or inability to sue stops it.

2. This means that Limitation, once it starts is never suspended. If a person becomes insane or dies *after* the right to sue has accrued, time will continue to run against them.

II. Is THERE ONLY ONE STARTING-POINT OF LIMITATION? OR CAN THERE BE A FRESH STARTING POINT OF LIMITATION.

1 Distinction must be made between the occurrence of a fresh cause of action and the occurrence of a fresh staring point if limitation in respect of the *same* cause of action. We are here considering cases where there occurs a fresh starting point of limitation in respect of the *same* cause of action.

2. The general rule of the Law of Limitation is that for a right to sue there is *only one* starting point of limitation and that starting point dates from the day when the right to sue accrues.

3. There are three cases where there is a fresh starting point of limitation in respect of the same cause of action :

(i) Case where there is an acknowledgement.

(ii) Cases where there is a part payment.

(iii) Cases where the cause of action arises out of a continuing breach of contract or out of a continuing Wrong independent of contract.

Section **19**—§ Acknowledgement

I. GENERALLY

1. The acknowledgement must have been made *before* the period of limitation has actually run out. An acknowledgement made *after* the period has run out is of no avail and cannot be given a fresh starting point of limitation.

2. The acknowledgement must be in writing.

3. The acknowledgement must be signed by the party liable or by his agent duly authorised to sign an acknowledgement of liability.

4. The acknowledgement need not be *to the* creditor.

5. The acknowledgement must contain an admission of a *subsisting liability.* It need not contain a promise to pay. Indeed it may be coupled with a refusal to pay or with a claim to a set-off.

II. SECTION 21 (2)—ACKNOWLEDGEMENT BY PERSONS JOINTLY LIABLE

1. When a property or a right is claimed against persons who are jointly liable such as joint-contractors, partners, executors, mortgagees, etc., an acknowledgement signed by any one of them (or by the agent of any one) render the rest chargeable.

III. SECTION 21 (3)—ACKNOWLEDGEMENT BY A HINDU WIDOW

Acknowledgement by a Hindu widow or other limited owner shall be binding upon the reversioners.

IV. SECTION 21 (3)—ACKNOWLEDGEMENT BY A HINDU MANAGER

The acknowledgement signed by (or by the agent of) the Manager of a joint Hindu family shall be binding upon the whole family where the acknowledgement is in respect of a liability incurred by or on behalf of the whole family.

§ Payment of interest on debt or on Legacy and Section 20—Part-payment of the Principal

1. The payment must be payment before time has run out.
2. The payment is made by the debtor or by his agent duly authorised to make such payment.
3. The payment must be *voluntary.*

Section 23—§ Continuing breach of contract and continuing wrong independent of contract

1. In the case of a continuing breach of contract or a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong continues.

Q.—What is meant by a continuing breach and a continuing wrong ?

Continuing breach of contract

1. Covenant to repair in a lease which is broken every day the premises are out of repair.
1. Use of premises contrary to the covenants in the lease.

Continuing wrongs in respect of a tort

1. Infringement of a trade mark.
2. Refusal of a wife to return to her husband.

In these cases the right to sue arises *de die in diem* (from day to day).

3. The distinction between a continuing and a non-continuing wrong is very difficult to draw. A wrong continues either because the effect of a wrongful act once done continues or because the wrongful act is repeated.

The case of a continuing wrong is the case where the wrongful act is repeated and not where the effect of a wrongful act continues.

CHAPTER 6
THE LAW OF CRIMINAL PROCEDURE IN BRITISH INDIA

PRELIMINARY
Wrong and the Remedy for it

1. One of the clauses in the constitution of the U. S. A. runs thus:

> " No citizen shall be deprived of his life, liberty and property without due process of law ".

Such a clause is not found in the constitution of other states. All the same every civilised State seeks to protect the life, liberty and property of its citizen

from unwarranted attacks.

Such a guarantee is the foundation of the state. With this object in view every state has a code of laws which defines what are wrongs. In India we have the Penal Code and the law of Torts.

2. Wrongs are either civil *or* criminal.

Some wrongs are both civil as well as criminal; *Assault, Defamation :* they are both civil as well as criminal wrongs. The aggrieved party can proceed both in a criminal court and also in a civil court.

3. *Remedy.* It would be of no avail whatsoever merely to enact wrongs' if for every wrong an appropriate remedy is not provided. On the other hand, it may be said, that the law recognises a wrong only when it provides a remedy for its vindication. When there is no remedy provided for the commission of a wrong, the enactment of a wrong would be an idle work.

Liberty of a person and the writ of Habeus Corpus.

4. The Criminal Procedure Code is a remedial law. It provides a remedy to the aggrieved party against the offender for the vindication of the criminal wrong done to him. It is a popular notion that the law allows ten guilty persons to escape rather than punish an innocent individual. This is absolutely incorrect. All that the law says is that no man shall be tried except in accordance with the procedure laid down by law.

5. The Criminal Procedure lays down :

(1) The Constitution of the Criminal Courts.

(2) The means and methods by which the accused may be brought before a Criminal Court for his trial.

(3) The rules as to trial of an accused.

(4) The rules as to punishment, and

(5) The rules as to rectification of an error in the trial, conviction or punishment of an accused.

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I. CONSTITUTION OF CRIMINAL COURTS

7. For a proper understanding of this subject a distinction must be drawn between the Presidency Towns system and the Provincial system.

Such distinction is often made in India in respect of other laws as well;

e.g. Insolvency— 1. Presidency Towns Insolvency Act.
2. Provincial Insolvency Act.

Small Causes—1. Presidency Towns Small Causes Courts Act.
2. Provincial Small Causes Courts Act.

A. Provincial System

1. Sessions Courts

Section 7 (1)

8. 1. Every Province shall be a Sessions Division or shall be divided into more than one Sessions Division. Every Sessions Division shall be

coterminus with a district or more than one district.

Section 9 (3)

3. For any Sessions Division there may be Additional Session Judges and Assistant Judges to exercise jurisdiction in one or more of Sessions Courts.

Section 9 (2)

4. The Court of Session shall hold its sitting at such place or places as may be notified by the L. G. in the Official Gazatte.

Section 9 (4)

5. A Sessions Judge of one division may also be appointed as an Additional Sessions Judge of another division in which case he may sit in either division to dispose of cases.

2. Magistrates Courts

9. **(1) District Magistrate.**

Section 10

(1) In every district there *shall* be magistrate of the first class who shall be called the District Magistrate.

(2) Any magistrate of the first class may be appointed to act as an Additional District Magistrate.

(2) **Sub-Divisional Magistrate.** *Section 8 (1)*

10. A District may be sub-divided into a sub-division. *Section 13 (1) and (2)*

A Magistrate of the 1 st or 2nd Class may be placed in charge of a sub-division and shall be called a Sub-Divisional Magistrate.

(3) **Subordinate Magistrates.** *Section 12 (1)*

11. In every District there may be appointed besides the District Magistrate, as many persons as may be necessary to be Magistrates of the first, second or third class.

They will exercise jurisdiction in such local areas as may be defined in the case of each.

Section 12 (2)

If no such area is fixed, their jurisdiction and power shall extend throughout such District.

3. **District Magistrate and 1st Class Magistrate**

The Code does not recognise any particular Court as that of the District Magistrate, but only Courts of 1st, 2nd and 3rd Class Magistrate.

Where a trial was commenced by an officiating District Magistrate and before its close he reverted to his original position as 1st Class Magistrate in which capacity he had jurisdiction over the offence, it was held : he had jurisdiction to continue the trial.

Emp. v/s Sayed Sajjad Husain 3 A.L.J. 825

11. As regards original jurisdiction, whatever the District Magistrate might do with regard to offences committed outside the division, the Sub-Divisional Magistrate is competent to try within his local jurisdiction. *4 A. 366.*

4. Special Magistrate

Section 14 (1)

12. (1) In any local area persons may be vested with the powers of the Magistrate of the 1st, 2nd or 3rd class in respect of particular cases or classes of cases or in regard to cases generally.

(2) To be called a Special Magistrate and to be prescribed for a term.

(3) Such a person may be an officer under its control.

(4) If he is a police officer, he shall not be below the grade of Assistant District Superintendent and he shall not have any power beyond what is necessary for :

(i) preserving the peace

(ii) preventing crime

(iii) detecting, apprehending and detaining offenders in order to their being brought before a Magistrate

(iv) the performance by him of other duties imposed upon him by any law for the time being in force.

5.Bench Magistrates

Section 15 (1)

13. Any two or more Magistrates may sit together as a Bench and may hear such cases or such classes of cases only and within such local limits as may be prescribed in that behalf.

6. Relation of the different Courts in the Provincial System

Section 17 (2)

14. Every Bench and every Magistrate in a sub-division shall be subordinate to the Sub-Divisional Magistrate. Within a sub-division, the jurisdiction of the District Magistrate and sub-divisional Magistrate are co-ordinating. *4 All. 366.*

Magistrate who is subordinate to S. D. M. is also subordinate to D. M. All Benches and Magistrates including Sub-Divisional Magistrates are subordinate to the District Magistrate.

Section 10(3)

An Additional District Magistrate shall be sub-ordinate to the District Magistrate for the purpose only of:

(i) Section 192 (1)

(ii) Section 407 (2)

(iii) Section 528 (2) and (3).

Section 17 (3)

All Assistant Sessions Judges are subordinate to the Sessions Judge in whose court they exercise their jurisdiction.

15. Subordinate.—(1) inferior in rank.

9 Bom. 100

8 Mad. 18 (F. B.)

(2) Subordinate in respect of judicial as well as

executive powers.

2 All. 205 (F. B.)

9 Bom. 100. There may be inferiority without subordination, but there cannot be subordination without inferiority, as subordinate means inferior in rank.

Section 17 (5)

Neither the District Magistrate nor the Magistrate and Benches shall be subordinate to the Sessions Judge except to be expressly provided by the Code.

Subordinate to the Sessions Judge only for the purposes of Section 123, 193, 195,408,431,436,437. If a Sessions Judge rule that touts should not be admitted to the Court it would not apply to the magistracy.

Subordinate means not merely subordinate so far as the regulation of work is concerned. Subordinate also means judicially inferior in rank, i. e. a Court over which another Court can proceed under Section 435. (call for records and pass orders) *9 Bom. 100.*

B. Presidency Towns System

1. Magistracy

Section 18(1)

16. In each of the Presidency Towns, a sufficient number of persons shall be appointed to act as Presidency Magistrates.

Of the number appointed for each town, one shall be appointed to act as a Chief Presidency Magistrate.

Any person may be appointed to act as an additional Chief Presidency Magistrate.

Section 19

17. Any two or more Presidency Magistrates may sit together as a Bench.

2. Relation of the Presidency Magistrates to the Chief Presidency Magistrate

Section 21

18. He is like a District Magistrate controlling Magistrates subordinate to him.

Local Government is to declare the extent of such subordination. *Control:*

1. Conduct and distinction of business and practice in Courts.
2. Constitution of Benches.
3. Settle times and places at which Benches shall sit.
4. Settle differences of opinion.

18. The Bombay Government has defined that Presidency Magistrate shall be subordinate to the Chief Presidency Magistrate.

I Bom. L. R. 437.

High Court

19. Along with these Criminal Courts, we have the High Courts of Judicature.

The High Courts owe their origin to the Charter Act passed by Parliament in 1861.

Section I empowered Her Majesty by *letters patent* to erect and establish High Courts for Bengal at Calcutta, for Bombay at Bombay, and for Madras at Madras.

Section 9

Each of the High Courts to be established under *Section 106* of this Act shall have and exercise all *such* Civil, Criminal, Admirality, and Vice-Admirality, Testamentary, Intestate and Matrimonial Jurisdiction, *original and appellate* and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as His Majesty may grant and direct.

High Court's Power of Superintendence

3 Pat L. J. *581. 7.B. Sheonandan v/s Emperor.*

1. High Court's powers of superintendence are limited by Section 15 of the Act of 1861 (Section 107 of the Government of India Act) to Courts subject to its appellate jurisdiction.

2. But where the High Court has appellate jurisdiction, even in a *modified* form from an inferior Court, it will exercise superintendence over that Court, even in cases which are not subject to appeal.

3. There are three classes of cases to be considered:

(a) Where a subordinate Court is subject to the *appellate jurisdiction* of the High Court, in certain cases, only the right of superintendence exists and its exercise is not confined to cases where a right of appeal lies to the High Court. This special power of superintendence is not as a rule exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision.

(b) In cases in which the High Court has powers of revision over subordinate or where the power of reference to the High Court exists, a modified form of appeal may be said to exist.

(c) The power of superintendency may be conferred upon the High Court by the Act constituting the subordinate Court independently of Section 15 of the Charter Act

4. A Court may be established without being made subject to the superintendence of the High Court.

The Relation of the High Court to other Criminal Courts *Section 15,107*

Each of the High Courts shall have powers of superintendence which may be subject to its appellate jurisdiction and shall have powers to call for returns etc.

What are the Courts subject to its appellate jurisdiction ? *Letters Patent.*

The High Court shall be a Court of appeal from the Criminal Courts in the Presidency.

3. *Pat. L.J. 5817. B* *Two questions*

Sheonandan v/s Emperor

1. Can the High Court have power of Superintendence where it has no power of appeal but has only power of revision or reference ?
2. Can there be a Criminal Court in the Presidency which will not be subject to its power of superintendence.

The Local limits of the jurisdiction:

10. (1) of the District Magistrate is the District.

11. (2) of the Sub- Divisional Magistrate is the Sub-Division.

12. (3) of the subordinate Magistrate, such local area as the Local Government may prescribe.

14. (4) of the Special Magistrate, such local area as the Local Government may prescribe.

20. (5) of the Presidency Magistrate.

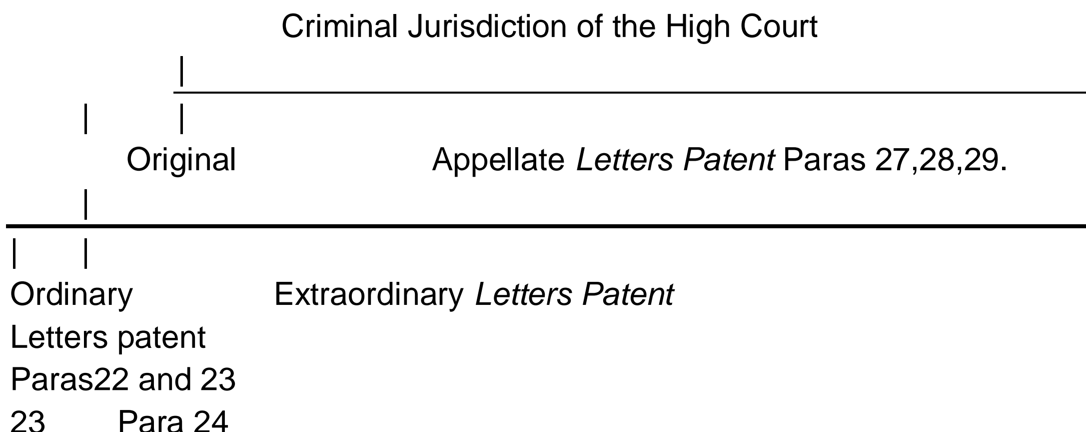
Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency-town for which he is appointed and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law.

(6) Sessions Judge—within the Sessions Division.

(7) High Court.

What are the powers granted by *letters-patent* in criminal matters.

22. The *letters patent* direct that High Court Jurisdiction shall be as follows:—



23. **Ordinary original Criminal jurisdiction.**—High Court shall have original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction.

24. **Extraordinary original Criminal Jurisdiction.**—High Court shall have Extraordinary Original Criminal Jurisdiction in places within the jurisdiction of any court subject to its superintendence.

25. *Appellate Criminal Jurisdiction.*—High Court shall be a Court of appeal

from the Criminal Courts in the Presidency and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Sentence on Escaped Convict Section 396.

(1) When a sentence is passed on escaped convict, such sentence, if of death, or fine or whipping shall subject to the provisions hereinafter contained, take effect immediately, and if on imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which at the time of his escape remained unexpired of his former sentence.

Explanation : for the purposes of this Section :

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment.

(b) a sentence of imprisonment with solitary Confinement shall be deemed severer than a sentence same description of imprisonment with solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

397. *Sentence on a person already undergoing sentence.—*

When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment,

penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence : Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced : Provided, further, that where a person, who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security, is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

398. (1) Nothing in Section 396 or 397 shall be held to excuse any person

from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2)

399. Confinment of youthful offenders in Reformatories.

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Suspensions, Remissions and Commutations of Sentences

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Section 401

Governor-General in Council or Local Government may suspend **or** remit on conditions or without conditions any sentence.

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Section 402 Power to commute sentences for any other mentioned

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IV.Conferment, Continuance and Cancellation of Powers

Section 39

(1) In conferring powers under this Code, the Local Government may, by order, empower persons specially by name or in virtue of their office or classes of officials *generally* by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

Section 40

Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is *appointed* to an equal or higher office of the same nature within a local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

Section 41

(1) The Local Government may withdraw all or any of the powers conferred under this code on any person by it, or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

Statement made by a witness in deposition is not a complaint. (Page left blank in MS.—ed.)

PART II

Trial of an Offender

1. TAKING COGNISANCE OF AN OFFENCE

When an offence has been committed, there are three ways in which the Magistrate can take cognisance of an offence.

Section 190

(a) upon receiving a complaint of facts which constitute such offence.

(b) upon a report in writing of such facts made by any police-officer.

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

A. Complaints to Magistrates.

1. Definition of a complaint.

= means the allegation made *orally* or in writing to a Magistrate, with a view to his taking action under the Cr. P. C. that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer.

Complaint must allege that an offence has been committed.

An application for taking action under Section 107 is not a complaint.

Complaint must be with Magistrate ; it must be with a view to his taking action.

Mere statement to a Magistrate by way of information without any intention of asking him to take action, is not a complaint.

e. *g.* An Assistant Collector writing to the District Magistrate complaining against a party but merely 'solicited for orders', did not amount to a complaint.

40 All. 641

It must be with a view to taking action under this Code.

A statement made to a Magistrate with the object of inducing him to take action not under this Code, but under Section 6 of the Bombay Gambling Act IV of 1887, is not a complaint within the meaning of this Section.

II. WHO MAY COMPLAIN

As a general rule the person aggrieved is the complainant.

But the complainant is not an essential party for initiation of criminal proceedings.

The Magistrate can act upon information received or upon his own knowledge.

Although, if he does so act, he shall be bound by the provisions ofSection491.

But there are exceptions to the general Rule.

These exceptions will be found in Sections 195 to 199-A. Section 195 deals with

(a) Prosecution for contempts of lawful authority of public servants.

(b) Prosecution of certain offences against public justice.

(c) Prosecution of certain offences relating to documents given in evidence.

In cases coming under (a) No courts shall take cognisance except on the complaint in *writing* of the public servant concerned or of some other public servant to whom he is subordinate.

In cases coming under (b) No court (shall take cognisance)except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

In cases coming under (c) (No Court shall take cognisance)except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

Section 196.Prosecution for offences against the State.

Unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf.

Section 196-A

Prosecution for certain classes of Criminal Conspiracy falling under Section 120-B of the 1. P. C.

If they fall under sub-Section (1) then :

Complaint must be under order of, or under the authority from, the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf.

If they fall under sub-section (2), the Chief Presidency Magistrate or D. M. has by order in writing, consented to the initiation of the proceedings.

Section 197

Prosecution of Judges, Magistrates and public servants for an offence alleged to have been committed by him, while acting or purporting to act, in the discharge of his official duty,

No Court shall take cognisance of such offence except with the previous sanction of the Local Government.

(2) Such Local Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judges, etc . .. is to be conducted, and may specify the Court before which the trial is to be held.

Section 198

Prosecution for breach of contract or defamation, or offences against marriage. No cognisance except upon a complaint made by some person aggrieved by such offence. Proviso : in certain cases some other person may with the leave of the Court, make a complaint on his or her behalf.

Section 199

Prosecution for adultery or enticing a married woman : No cognisance except upon a complaint made by the husband of the woman, or in his absence, made with the leave of the Court, by some person who had care of such person on his behalf at the time when such offence was committed.

POLICE REPORT

I. How does it originate ?

It originates in what is known as the first information. Information is usually given by the aggrieved party. But it may be given by any party. Even a police officer may give such information based on his knowledge. Not only that but in certain cases the law compels certain persons to give information.

Section 44.

Every person shall give information to the Magistrate or Police of certain offences.

Section 45

Information given to the police may refer to a cognisable offence or to a non-cognisable offence.

Cognisable offence is one in which the police can arrest without a warrant.

Non cognisable offence is one in which the police cannot arrest without a warrant. *Section 154*

Information relating to a cognisable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant and every such information whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance of it shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

Section 155 Information relating to non-cognisable offence :

He shall enter in a book to be kept the substance of such information and refer the informant to the Magistrate.

Section 155

No police-officer shall investigate a non-cognisable case, without the order of a Magistrate of the 1st or 2nd class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Section 156

Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognisable case which a Court having jurisdiction over the local area within the limits of such station, would have power to inquire into.

The police report which can be the basis of action by a Magistrate, is based upon information relating to a cognisable offence.

Section 157

If, from information received i.e. under Section 154, the officer has reason to suspect the commission of a cognisable offence then;

(1) He shall send a report of the same to a Magistrate empowered to take cognisance of it.

(2) Shall proceed to the spot to investigate the facts and circumstances of the case

and

(3) take measures, if necessary, for the discovery and arrest of the offender.

Provided

(a) that the informant gives the names of the offender and the case is not of a serious nature, the officer need not proceed in person to make

an investigation on the spot.

(b) that if the officer thinks, there are no sufficient grounds for entering on an investigation, he shall not investigate the case.

He shall state in his said report his reasons for not complying fully with the requirements of the Section.

He should notify to the informant that he will not investigate the case or cause it to be investigated. But this withdrawal of the police cannot block the prosecution of the offender. They are two ways yet open.

1. The Magistrate, on receiving such report, may direct an investigation or may at once proceed and ask subordinate Magistrate to hold a preliminary inquiry into or otherwise dispose of the case in manner provided by the case.

This is a preliminary report before completion of the investigation. The Magistrate can act under Section 159. But if the report is submitted *after investigation,* the Magistrate is not empowered to act under this Section.

II. The aggrieved party may move.

If the police do not move, then they have the following powers ; *Section 160*
(1) to require attendance of witnesses by an order in writing.

Witnesses are not required to tell the truth under this Section. If they give false testimony they cannot be prosecuted. They don't sign it. It is made before police.

Section 161

Police may examine witnesses acquainted with the facts of the case.

(2) Such witnesses shall be bound to answer all questions put to them, unless the question incriminates them.

Although Police can take statements from witnesses yet

Section 162

(a) they shall not be signed by them,

(b) they shall notice made use of at any inquiry or trial, in respect of any offence under investigation at the time when such statement was made.

Provided that, on the request of the accused, the Court shall refer to such writing and direct that the accused be given a copy thereof for contradicting such witness, provided that Court may exclude that part which is irrelevant or its disclosure is inexpedient with interests of the public or does not promote the ends of justice.

In short, they do not form evidence which can be said to be admissible.

If such statements are to be treated as evidence, then they must be recorded by Magistrates and not Police Officers. Consequently provision is made in the Criminal Procedure Code.

Section 164

Any Presidency Magistrate, Magistrate 1st class and Magistrate of the Second class especially empowered may, if he is not a police officer

record any *statement or confession* made to him in the course of an investigation under this chapter.

Statement shall be recorded in a manner prescribed for recording evidence.

Confession is to be recorded in the manner provided for in Section 364.

Provided that the Magistrate, before recording such confession, shall explain to the accused that he is not bound to make it and if he does so it may be used as evidence against him.

No Magistrate shall record, unless he has reason to believe, that it is made voluntarily.

On recording confession. Magistrate shall make a memorandum at the foot showing that he has observed the conditions.

Search

Section 165

(1) In the course of his investigation, a police officer may find it necessary to make a search in any place. Such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of that station in his charge.

(2) The police officer shall, as far as possible, conduct the search in person.

(3) He may authorise his subordinate after recording reasons in writing and specifying the place and thing to be searched.

(4) The provisions of the Code, as to search warrants and the general provisions as to searches contained in Section 102 and Section 103, shall apply.

(5) Copies of record made during search shall be sent to the nearest Magistrate and the owner or occupier of the place of search shall be given a copy of the record on payment of fees.

Section 166

Police officer can cause search to be made within the area of another police station.

Section 167

If the investigation cannot be completed within 24 hours fixed by Section 61, and *there are grounds for believing that the accusation or information is well founded,* the Police shall forthwith transmit to the nearest Magistrate, a copy of the entries in the diary hereinafter prescribed relating to the case and shall, at the time, forward the accused to such jurisdiction.

(2) The Magistrate shall, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding 15 days.

(3) A Magistrate authorising detention in police custody shall record reasons for so doing.

Section 169

When police officer finds that there is not sufficient evidence or reasonable ground of suspicion to justify forwarding the accused to Magistrate *he shall release him* on his executing a bond with or without sureties *to appear if and*

when so required, before a Magistrate empowered to take cognisance.

Section 170

(1) When police officer finds that there is sufficient evidence or reasonable ground, such officer shall forward the accused under custody to a Magistrate empowered to take cognisance.

(2) Along with this, he shall send article necessary to be produced before Magistrate and shall require complainant and witnesses, to execute a bond to appear before Magistrate.

Section 173

The police officer shall send a report giving names of parties, information each is responsible for.

Accused is entitled to a copy of the report. *Exemption of accused from attendance.* Section 205; 366; 424; *6 All. 59: 21Cal.588*

Section 205.—Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(21) But the Magistrate may call accused at any time. *Section 366.—Time of Judgement.*

Should be read in the presence of the accused unless it is dispensed with and the sentence is of fine only.

Section 424.—Judgement by appellate Court. Accused need not be called to hear judgement.

II. Of how many offences can the Court take cognisance of at one trial

Joinder of Charges

Sections 233, 234, 235 *Section 233.*

1. *Every offence shall be tried separately.*

A is accused of theft on one occasion and of causing grievous hurt on another occasion. A must be tried separately for the two offence. He cannot be tried for both at one trial. There are exceptions to this general proposition.

Section 234

Three offences *of the same kind* may be tried at one trial *if they are committed within the space of twelve months,* irrespective of the question whether they are committed against the same person or not.

Offences of the same kind = Offences punishable with the same amount of punishment under the same section of the 1. P. C. or of any special or local law.

2. *Must not exceed three.* Joinder of charges of three offences under section 411 and three offences under 414isbad. Three offences of forgery and three offences of breach of trust bad.

Same kind. Adultery and bigamy |

Murder and hurt | not same

The rule as to kind is subject to two proviso.

(1) Offences under Section 379 (Theft) and under Section 380 (Theft in a dwelling house) shall be deemed to be offences of the same kind even though they are not offences under the same section and the punishment for them is not identical.

(2) The offence and the attempt to commit that offence (Section 511 I. P. C.) shall be deemed to be offences of the same kind even though they are not offences under the same section and the punishment for them is not identical.

Section 235 (2)

When an act constitutes an offence under two or more separate definations of any law defining or punishing offences the person accused of them may be tried at one trial for each of such offences.

Section 235 (3)

When an act, which by itself constitutes an offence, constitute when combined with another a different offence.

The person accused of them may be tried at one trial for the offences, constituted by such act when combined, and for any offences constituted by the act when taken by itself.

This is so when the act or acts done by the accused constitutes a single offence.

But it may be, that the acts done by the accused constitute more than one offence i.e. show that a plurality of offences have been committed.

Can the accused be tried for all such offences at one trial ? Or must he be tried separately for each offence ?

The rules as to this will be found in *Section 235 (1)*

If the acts amounting to different offences are committed by the accused in the course of the *same transaction,* then he may be tried at one trial for every such offence.

1. *Same transaction*

In deciding whether acts constituting an offence are so connected as to form one and the same transaction, the determining factor is not so much proximity in time as continuity and community of purpose and object.

A mere interval of time between the commission of one offence and another does not by itself import want of continuity, though length of interval may be an important element in determining the question of connection between the two.

2. There is no limit to the number of offences that can be tried together.

III, Of how many offenders can the Court try at one trial

Joinder of Accused

Section 239

The following persons may be charged and tried together:

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abatement, or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind within the meaning of Section 234 *committed by them jointly* within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, or criminal misappropriation,

and

(f) persons accused of receiving or retaining, or assisting in the disposal or concealment of property, the possession of which is alleged to have been transferred by any such offence committed by the first-named persons,

or

persons accused of abutment of or attempting to commit any such last-named offence.

(f) persons accused of offences under sections 411 and 414 of the 1. P. C. or either of those sections in respect of stolen property, the possession of which has been transferred by one offence.

(g) persons accused of any offence under Chapter XII of the 1. P. C. relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abutment of or attempting to commit any such offence.

NOTE.—The foundation for the procedure of joint trial of different persons is their association from start to finish to attain the same end.

The fact that they carried out their scheme by successive acts done at intervals does not prevent the unity of the project from constituting the series of acts one transaction i.e. the carrying through of the same object which they had from the first act to the last.

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5 Mad. 199

IV. Securing the presence of the accused and the witness

Although the Court has taken cognisance of an offence, the actual criminal proceedings can commence only when *the accused* and the witnesses are present in Court, the one to answer the charge and the other to give evidence.

How are they to be brought before the Court ? Section 104

1. When cognisance is taken on police report based on investigation conducted under Section 173, the accused and witnesses are already before the Court.

II. When cognisance is taken otherwise than on police report under Section 173, the accused and the witnesses are not before the Court. They have to be brought before the Court.

What is the process for bringing them before the Court ?

The Criminal Procedure Code contemplates two such processes.

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